IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

MISC. APPEAL NO. 889 OF 2004

Division Bench

IN THE MATTER OF:

BHARAT ALUMINIUM CO. LIMITED
Balconagar, Korba – 495684,
Chhattisgarh. ... APPELLANT

VERSUS

KAISER ALUMINIUM
TECHNICAL SERVICES, Inc.
6177 Sunol Boulevard
Pleasanton, Califiornia 94566-7769 ... RESPONDENT

APPEAL UNDER SECTION 37(1)(b) OF THE ARBITRATION AND CONCILIATION ACT, 1996, AGAINST THE JUDGEMENT AND ORDER DATED 20.07.2004PASSED IN MJC NO.92/2003, BY THE DISTRICT JUDGE BILASPUR. C.G.

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR
(Division Bench)

CORAM : Hon'ble Shri A.K. Patnaik, CJ
& Hon'ble Shri V.K. Shrivastava, J.

MISC. APPEAL NO. 889 OF 2004

AND

MISC. APPEAL NO. 890 OF 2004

ORDER FOR CONSIDERATION

Sd/-
Chief Justice

HON'BLE SHRI V.K. SHRIVASTAVA, J

I agree

Sd//-
V.K.Shrivastava
Judge

POST IT FOR: 10/08/2005

Sd/-
Chief Justice

AFR

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR
(Division Bench)

CORAM : **Hon'ble Shri A.K. Patnaik, CJ**
& Hon'ble Shri V.K. Shrivastava, J.

MISC. APPEAL NO. 889 OF 2004

Bharat Aluminium Co. Limited — Appellant.

Versus

Kaiser Aluminium Technical Services, Inc. — Respondent.

MISC. APPEAL NO. 890 OF 2004

Bharat Aluminium Co. Limited — Appellant

Versus

Kaiser Aluminium Technical Services, Inc. — Respondent

Present: Mr. Vivek Tankha, Mr. S.N. Mukherjee, Sr. Advocates with Mr.Abhishek Sinha learned counsel for the appellant.

Mr. Ravish Agrawal, Sr. Adv., with Mr. Sanjay S. Agrawal learned counsel for the respondent.

ORDER
(Passed on 10th of August, 2005)

The following Order of the Court was passed by **A.K. Patnaik, CJ: -**

The two miscellaneous appeals are appeals under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "the Indian Act"*).

2. The facts briefly are that an agreement dated 22.04.1993 was executed between the appellant and the respondent under which the respondent was to supply installed equipment for modernization and upgradation of the production facilities of the appellant at Korba in the State of Chhattisgarh. The agreement provided for settlement of disputes by arbitration. Certain disputes arose between the parties and were

referred to arbitration. The arbitration was held in England and the arbitral tribunal made two awards dated 10.11.2002 and 12.11.2002 in England. The appellant thereafter, filed applications under Section 34 of the Indian Act for setting aside the two awards dated 10.11.2002 and 12.11.2002 in the Court of learned District Judge, Bilaspur which were numbered as MJC Nos.92 of 2003 and 14 of 2003, respectively. By order dated 20.07.2004, the learned District Judge, Bilaspur held that the applications filed by the appellant under Section 34 of the Indian Act for setting aside the two foreign awards are not tenable and accordingly dismissed the same. Aggrieved, the appellant has filed these appeals.

3. Mr. Vivek Tankha and Mr. S.N. Mukherjee, learned counsel appearing for the appellant in the two appeals submitted that in the impugned order dated 20.07.2004, the learned District Judge has held that the application filed by the appellant under Section 34 of the Indian Act was not maintainable, but the learned District Judge has not recorded any reason whatsoever for coming to the aforesaid conclusion. They argued that the learned District Judge should have decided the issues of fact and law raised by the parties in their respective pleadings, but no such exercise has been undertaken by the learned District Judge in the impugned order. They submitted that since the impugned order is without any reason, it is liable to be set aside. In support of their submission, they relied on the decision of the Supreme Court in **Smt. Swaran Lata Ghosh vs. Harendra Kumar Banerjee & Another, AIR 1969 SC 1167** and **State of Punjab vs. Bhag Singh, 2004 AIR SCW 102.**

4. Mr. Tankha next submitted that the learned District Judge has proceeded on the assumption that the provisions of Section 34 of the Indian Act are not applicable to a "foreign award" and for this reason held that the applications filed by the appellant under Section 34 of the Indian Act to set aside the foreign awards were not maintainable. He submitted that this view taken by the learned District Judge is contrary to the decision of the Supreme Court in Bhatia International vs. Bulk Trading S.A. & Another (2002) 4 SCC 105 in which it has been held that the Indian Act applied to the arbitration which are held in India between the Indian Nationals as well

as to international commercial arbitrations whether held in India or out of India. He also cited the decision of the Gujarat High Court in **Nirma Ltd. vs. Lurgi Energie Und Entsorgung GMBH, Germany & Others, AIR 2003 GUJARAT 145** in which a Division Bench of the Gujarat High Court has taken a view that when the agreement between the parties was governed by the Indian law, then the application for setting aside the award made outside the country can also be filed in a Court in India under Section 34 of the Indian Act. Mr. Tankha submitted that since the agreement between the parties was governed by the Indian law, the learned District Judge should have held that the applications for setting aside the awards could be filed under Section 34 of the Indian Act before the learned District Judge at Bilaspur.

5. Mr. Mukherjee, learned counsel appearing for the appellant further submitted that Article 22 of the agreement between the parties provided that the agreement will be governed by the prevailing law of India and therefore parties to the agreement have chosen the prevailing law of India as the law governing the rights of the parties. He submitted that since the substantive rights of the parties to the agreement are to be governed by the law prevailing in India, even though the arbitration has taken place and the awards have been made in England can be challenged in a Court in India by an application under Section 34 of the Indian Act. He submitted that in the case of **Bhatia International Vs. Bulk Trading S.A. and another** (Supra) the Supreme Court has laid down the test that if a Court has jurisdiction to entertain an application under Section 9 of the Indian Act it would also have jurisdiction to entertain an application under Section 34 of the Indian Act to set aside an award made by the arbitrator. He argued that in the present case since the cause of action in connection with the subject matter of the jurisdiction arose within the jurisdiction of the District Judge at Bilaspur, the District Judge at Bilaspur had the jurisdiction to entertain the application under Section 9 of the Indian Act and accordingly also under Section 34 of the Indian Act to set aside the award. Mr. Mukherjee submitted that Part-II of the Indian Act provides for enforcement of certain foreign awards and Section 48 therein stipulates the conditions for enforcement of the foreign awards. He submitted that it will be clear from Section 48(1) (e) of the Indian Act that a foreign award can be set aside or suspended by a competent authority of the country in which, or

under the law of which, that award was made and hence a foreign award can be set aside or suspended not only by the competent authority of the country in which the award is made but also by a competent authority of the country under the law of which the award was made. He vehemently submitted that since it is the law of India which governs the agreement between the parties, the awards have been made under the law of India and the competent authority in India can under Section 48(1)(e) of the Indian Act also set aside or suspend the awards in the present case though the same have been made in England. In support of his submission, he relied on the decision of the Division Bench of Calcutta High Court in **White Industries Australia Limited Vs. Coal India Limited** reported in **2004 (2)(CLJ (Cal) 197** in which it has been held that where the express choice of the parties with regard to the law of the contract is Indian Law and the contract was signed in India and was performed in India, there is no reason for the Court to hold that the expression "under the laws of which that award was made" in Section 48 (1)(e) of the Indian Act would mean nothing but Indian Law.

6. Mr. Mukherjee also relied on the decisions of the Supreme Court in **NTPC Vs. Singer Company and others (1992) 3 SCC 551** and **Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. (1998) 1 SCC 305** in support of his contention that if the proper law of contract chosen by the parties is the law of India, then the Courts in India would have the jurisdiction to consider the applications for setting aside awards made by arbitrators outside the country. He also relied on a similar view taken by Justice Potter in the decision of the Queens Bench Division in **Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd.** reported in **(1994) Lloyd's Law Reports 45.** He finally submitted that in view of the aforesaid law laid down by the Courts, the appeals should be allowed and the impugned order dated 20/07/2004 of the learned District Judge should be set aside and the matter should be remanded back to the learned District Judge to decide the matter afresh in accordance with law.

7. Mr. Ravish Agrawal, Sr. Advocate, on the other hand, submitted that Article 17.1 of the agreement between the parties provided that any dispute or claim arising out of or relating to the agreement shall be in the first instance settled amicably by negotiation between the parties failing which the same will be settled by arbitration pursuant to the English

Arbitration Law and subsequent amendments thereto. He pointed out that Article 17.2 of the agreement between the parties further provided that the arbitration proceedings shall carried by two arbitrators; one appointed by the appellant and the other appointed by the respondent chosen freely and without any bias and the Court of arbitration shall be held wholly in London, England. He submitted that Article 22 of the agreement between the parties not only provided that the agreement will be governed by the prevailing law of India but also that "in case of Arbitration the English Law shall apply". He argued that a reading of the aforesaid clauses of the agreement between the parties would show that the English Arbitration Act, 1996 (*hereinafter referred to as "the English Act")* was to apply to the conduct of arbitration and the award was to be made under the English Act. He further submitted that the aforesaid clauses in the agreement also made it clear that the arbitration was to be held in England. He also submitted that a reading of different paragraphs of the awards would show that as a matter of fact the arbitration was conducted in accordance with the provisions of the English Act. He explained that the respondent invoked the arbitration under Section 14 of the English Act, the Tribunal comprised of an Arbitrator appointed by each party and an Umpire as provided in Section 16(6)(b) of the English Act. He further submitted that Section 10 of the Indian Act does not provided for Umpire but only a presiding and a third arbitrator. He, however, submitted that since the role of the Tribunal could not be agreed upon, the Tribunal directed that the arbitration would proceed in accordance with Section 21(2)(3) & (4) of the English Act. He further submitted that the respondent claimed compound interest under Section 49 of the English Act and no objection was taken by the appellant in the reply under Section 49 of the English Act did not apply, rather the appellant itself claimed compound interest @80%. He submitted that in course of arbitration, the respondent applied for leave to seek interim relief under Section 44(2)(e) and Section 44(4) of the English Act and no objection was taken by the appellant that Section 44 of the English Act did not apply. He submitted that in course of the arbitration proceedings, the respondent also applied to the Tribunal to invoke the power under Section 34 of the English Act and the Tribunal accordingly fixed a time table exercising such powers and no objection was taken that Section 34 of the English Act did not apply. He further pointed out that the respondent also applied for an interim award under Section 47 of the English Act and no objection was taken by the appellant that the

English Act did not apply to the arbitration and no interim award could be made under Section 47 of the English Act.

8. Mr. Agrawal submitted that Part-I of the Indian Act applied only to cases where the place of arbitration is India and the award made by the arbitrator is a domestic one and this will be clear from sub-Section 5 of Section 2 of the Indian Act. He further submitted that Part–II of the Indian Act provides for enforcement of certain foreign awards and Chapter-I of Part-II of the Indian Act relates to New York Convention Awards and applies to an arbitral award on differences between persons made on and after the 11th day of October, 1960 in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies as would be clear from Section 44 in Chapter-I of Part-II of the Indian Act. He further submitted that Chapter-II of Part-II of the Indian Act relates to Geneva Convention Awards and applies to arbitral awards on differences in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies. He argued that to arbitral awards referred to in Sections 44 and 53 of the Indian Act the provisions of Part-I including Section 34 of the Indian Act has no application.

9. Mr. Agrawal further submitted that enforcement of the foreign award may be refused only one of the conditions mentioned in Section 48 in Part-II of the Indian Act. He submitted that Section 48(1)(e) provides that a foreign award may be refused to be enforced at the request of the party against whom it is invoked if that party furnishes to the Court proof that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. In the instant case, the award has been made in England and also under the law of arbitration in England and could be set aside or suspended by a competent authority of England and not by a Court in India. Hence, the Court of the learned District Judge Bilaspur had no jurisdiction to entertain the application under Section 34 of the Indian Act to set aside the award.

10. Mr. Agrawal relied on the decision of the Supreme Court in **Transocean Shipping Agency (P) Ltd. vs. Black Sea Shipping & Others** reported in **(1998) 2 SCC 281**, in which it has been held that since no steps have been taken in accordance with the law of Ukraine to challenge the

arbitration or the award, the award had become final and binding as per the Ukrainian law. He also relied on the decisions in **Force Shipping Limited vs. Ashapura Minechem Limited** reported in **MANU/MH/0260/2003** in which, the High Court of Bombay has held that Part-II of the Indian Act make special provisions for "enforcement of foreign award" and the provisions in Part-I of the Indian Act dealing with those aspects as provided in Part-II will not apply to foreign awards. He also cited the decision of the High Court of Bombay in **Jindal Drugs Limited vs. Noy Vallesina Engineering SpA and Others**, reported in **2002(2) Arb. LR 323 (Bombay)** in which a view has been taken that the Indian Act provides for different kinds of remedies to the persons aggrieved by a domestic award and a person aggrieved by a foreign award and both the remedies are equally efficacious and adequate. Mr. Agrawal pointed that in **Bhatia International vs. Bulk Trading S.A. & Another** (supra) the Court was concerned only with the maintainability of the proceeding under Section 9 of the Indian Act in respect of an arbitration held out side India and was not concerned with the enforcement of foreign award. He referred to paragraph 26 of the judgment of the Supreme Court in the said case of **Bhatia International vs. Bulk Trading S.A. & Another** (supra) in which the Supreme Court has clarified that special provisions for enforcement of foreign awards are made in Part-II of the Indian Act and to the extent that Part-II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part-I dealing with these aspects will not apply to such foreign awards. He also cited paragraph 28 of the said judgment of the Supreme Court in which the Supreme Court has clarified that foreign awards which are enforceable in India are deemed to be decrees and can be executed relying on Sections 49 & 58 of the Indian Act. Mr. Agrawal further submitted that the decisions of the Gujarat High Court in the case of **Nirma Ltd. vs. Lurgi Energie Und Entsorgung GMBH, Germany & Others** (supra), the Calcutta High Court in the case of **White Industries Australia Limited Vs. Coal India Limited** (supra), the Supreme Court in the case of **NTPC Vs. Singer Company and others** (supra) and the decision of the Supreme Court in **Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd.** (supra) were decided on the facts of those cases and are not applicable to the present case. He submitted that the learned District Judge, Bilaspur has therefore rightly held in the impugned order dated 20.07.2004 that the applications filed by the appellant for setting aside the

awards under Section 34 of the Indian Act were not maintainable and has rightly dismissed the same and this Court should not interfere with the impugned order in the present appeals.

11. On a reading of the said impugned order dated 20/07/2004 we find that the learned District Judge has recorded the contentions of the learned counsel for the parties and has also quoted the decisions cited by the learned counsel for the parties and has finally held in paragraph 16 of the impugned order that the application filed by the appellant under Section 34 of the Indian Act was not tenable and was liable to be dismissed, but he has not given his reasons for this conclusion. Since the learned District Judge has failed to give his reasons for coming to the conclusion that the application filed by the appellant under Section 34 of the Indian Act was not tenable and was liable to be dismissed, it is now incumbent upon this Court as an appellate Court to consider the contentions of the parties on the maintainability of the application filed by the appellant under Section 34 of the Indian Act and give adequate reasons for recording its conclusion on the issue. Only if it is not possible for this Court to decide the issue with regard to the maintainability of the applications under Section 34 of the Indian Act filed by the respondent on the basis of the materials available before the Court, the Court will have to set aside the order passed by the District Judge and remand the matter to the learned District Judge to decide the issue afresh after giving opportunity to the parties to adduce the relevant evidence.

12. In **Smt. Swaran Lata Ghosh vs. Harendra Kumar Banerjee & Another** (supra) cited by the learned counsel for the appellant, the Supreme Court found that neither the trial Judge nor the High Court in appeal recorded reasons in support of their conclusion that the plaintiff had proved the case in the plaint and for this reason the Supreme Court set aside the decree passed by the High Court and remanded the suit to the trial Court for trial according to law. This will be clear from the following observations of the Supreme Court in paragraph 6 of the said judgment as reported in AIR 1969 SC 1167:-

> "It is unfortunate that the learned Trial Judge has recorded no reasons in support of his conclusion, and the High Court in appeal merely recorded

that they thought that the plaintiff had sufficiently proved the case in the plaint."

13. Similarly, in **State of Punjab vs. Bhag Singh** (supra) cited by the learned counsel for the appellant, the Supreme Court found that neither the trial Court nor the High Court had appreciated the entire evidence for coming to the conclusion on the guilt or otherwise of the accused and accordingly set aside the judgment of the High Court and directed the High Court to hear and dispose of the appeal in accordance with law. The relevant portion of the judgment of the Supreme Court in **State of Punjab vs. Bhag Singh** (supra) is quoted herein below:

> "The trial Court was required to carefully appraise the entire evidence and then come to a conclusion. If the trial Court was at lapse in this regard the High Court was obliged to undertake such an exercise by entertaining the appeal. The trial Court on the facts of this case did not perform its duties, as was enjoined on it by law. The High Court ought to have in such circumstances granted leave and thereafter as a first Court of appeal, reappreciated the entire evidence on the record independently and returned its findings objectively as regards guilt or otherwise of the accused.

14. In the present case, we find that we can decide the issue with regard to the maintainability of the applications filed by the appellant under Section 34 of the Indian Act in the Court of the learned District Judge, Bilaspur on the basis of the agreement between the parties and the awards made by the arbitrator which were part of the records of the Court of learned District Judge and which have also been annexed to the memorandum of appeal. We do not think therefore that it is necessary to remand the matter to the learned District Judge for fresh decision on this issue in accordance with law.

15. The only question which has to be decided by us in the two appeals is whether Section 34 of the Indian Act can be invoked by the appellant to set aside the awards dated 12.11.2002 and 10.11.2003 in favour of the respondent. Section 34 of the Indian Act is located in part-I of the Indian Act, which is titled "Arbitration". Part-II of the Indian Act is titled

"Enforcement of certain foreign awards". In **Bhatia International vs. Bulk Trading S.A. & Another** (supra) the question whether Part-I of the Indian Act applies to arbitration which take place only in India or also to international arbitration which takes place outside India came up for consideration and the Supreme Court held that Part-I of the Indian Act applies not only to arbitrations which take place in India but also to international arbitrations which take place outside India. In the said decision, however, the Supreme Court clearly held that Part-II of the Indian Act contains special provisions for enforcement of certain foreign awards and to the extent that part-II provides a separate definition of arbitral award and separate provisions for enforcement of foreign awards, the provisions in part-I dealing with this aspect will not apply to foreign awards. The relevant portion of the said judgment of the Supreme Court as reported in (2002) 4 SCC 105, is quoted herein below:

> "26. xxx xxx xxx. The said Act is one consolidated and integrated Act. General provisions applicable to all arbitrations will not be repeated in all Chapters or Parts. The general provisions will apply to all Chapters or Parts unless the statute expressly states that they are not to apply or where, in respect of a matter, there is separate provision in a separate Chapter or Part. Part II deals with enforcement of foreign awards. Thus Section 44 (in Chapter I) and Section 53 (in Chapter II) define foreign awards, as being awards covered by arbitrations under the New York Convention and the Geneva Convention respectively. Part II then contains provisions for enforcement of "foreign awards" which necessarily would be different. For that reasons special provisions for enforcement of foreign awards are made in Part II. To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to "foreign awards". The opening words of Section 45 and 54, which are in Part II, read "notwithstanding anything contained in Part I". Such a *non obstante* clause had to be put in because the provisions of Part I apply to Part II.

In paragraph 23 of the aforesaid judgment, the Supreme Court, however, held relying on the definition of "domestic award" in Section 2 (7) of the Indian Act that foreign awards for which special provisions have been made in Part-II of the Indian Act are those awards which have made pursuant to arbitration in a convention country, whereas the awards made outside India in an international commercial arbitration in a non-convention country is to be considered a "domestic award" made under Part-I of the Indian Act.

16. There is no dispute in this case that the arbitration was held in England and that the award was also made in England. There is also no dispute over the fact that England is a New York convention country. Chapter-I of Part-II of the Indian Act is titled "New York Convention Awards". Section 44 in Part-II of the Indian Act defines a "foreign award" and is quoted herein below:

> "**PART-II**
>
> ENFORCEMENT OF CERTAIN FOREIGN AWARDS
>
> **CHAPTER I**
>
> New York Convention Awards
>
> 44. **Definition**. – IN this Chapter, unless the context otherwise requires, "foreign award" means an arbitration award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-
>
> (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and
>
> (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

It will be clear from the language of Section 44 of the Indian Act quoted above that unless the context otherwise requires, in Chapter-I "foreign award" means an arbitral award made in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule to the Act applies. The First Schedule is titled "Convention on the recognition and enforcement of foreign arbitral awards" and Article I therein states as follows:

"**THE FIRST SCHEDULE**

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

It will be clear from the language used in article I in the First Schedule quoted above that the convention applies to the recognition and enforcement of foreign arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. In the present case the two awards have been made in England and the recognition and enforcement of the awards dated 10.11.2002 and 12.11.2003 are sought in India. Hence two awards dated 10.11.2002 and 12.11.2003 are "foreign awards" within the meaning of Chapter-I of Part-II of the Indian Act. Sections 48 and 49 in Chapter-I of Part-II of the Indian Act which relate to enforcement of the foreign awards and which apply to the foreign awards dated 10.11.2002 and 12.11.2003 are quoted herein below:

"**48. Conditions for enforcement of foreign awards.**-(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that-

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the part against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it

contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that-

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation.- Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

49. Enforcement of foreign awards. – Whether the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court."

It will be clear from Section 48(1)(e) of the Indian Act that enforcement of a foreign award may be refused at the request of the party against whom it is invoked, if that party furnishes to the Court proof that the award has been

set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. To the extent Section 48 (e) makes provision regarding the competent authority which can set aside a foreign award, the provision in Section 34 of Part-I of the Indian Act is excluded as per the decision of the Supreme Court in the case of **Bhatia International vs. Bulk Trading S.A. & Another** (supra).

17. While the case of the appellant is that the award was made under the law of India and accordingly under Section 48(1)(e) of the Indian Act the Court in India is the competent authority to set aside or suspend the awards, the case of the respondent is that the two awards have been made in England and under the law of England and accordingly under Section 48(1)(e) of the Indian Act it is only the Court in England which may set aside or suspend the award. Hence, the question to be decided is whether the award has been made under the law of India or under the law of England. Articles 17.1, 17.2, 17.3 and 22 of the agreement between the parties are quoted herein below:

> **"ARTICLE 17 – ARBITRATION**
>
> 17.1 Any dispute or claim arising out of or relating to this Agreement shall be in the first instance, endeavor to be settled amicably by negotiation between the parties hereto and failing which the same will be settled by arbitration pursuant to the English Arbitration Law and subsequent amendments thereto.
>
> 17.2 The arbitration proceedings shall be carried by two Arbitrators one appointed by BALCO and one by KATSI chosen freely and without any bias. The Court of Arbitration shall be held wholly in London, England, and shall use the English language in the proceedings. The findings and award of the Court of Arbitration shall be final and binding upon the parties.
>
> 17.3 Before entering upon the arbitration, the two Arbitrators shall appoint an Umpire. If the two arbitrators are not able to reach an agreement on the selection of an Umpire, the Umpire shall be nominated by the International Chamber of Paris
>
> **ARTICLE 22 – GOVERNING LAW**

> This Agreement will be governed by the prevailing law of India and in case of Arbitration, the English Law shall apply."

It will be clear from the article 17.1 of the agreement quoted above that disputes between parties were to be settled by "arbitration pursuant to the English Arbitration Law". It will also be clear from article 17.2 quoted above that the Court of Arbitration was to be held wholly in London, England. Article 17.3 further provides that before entering upon the arbitration, the two Arbitrators shall appoint an Umpire. Chapter-III of the Indian Act titled "Composition of Arbitral Tribunal" and in particular Sections 10 and 11 therein do not provide for appointment of an Umpire. On the other hand, Section 16(6)(b) of the English Act provides for appointment of an Umpire. Article 22 of the agreement provides that the agreement will be governed by prevailing law of India and in case of arbitration the English Law shall apply. It will thus be clear from the various provisions of the agreement between the parties that the arbitration was to be conducted in accordance with the English Law.

18. Moreover, the arbitration has in fact been conducted and the award has been made in accordance with the English Law and this will be clear from paragraphs 32, 37, 42 and 45 of the award dated 12.11.2002 which are quoted herein below:

> "32. Negotiations to reach a settlement of these disputes were unsuccessful. Pursuant to the provisions of Article 17 of the Modernisation Agreement and Section 14 of the English Arbitration Act the Claimant submitted a written Notice and Request for Arbitration to the Respondent on November 13th 1997. The Notice was accompanied by a letter dated November 13th 1997 from Mr. David Kjos, Vice-President of the Claimant.
>
> 37. Under Article 17.3 of the Modernisation Agreement and section 16(6)(b) of the English Arbitration Act, the arbitrators are required to appoint an Umpire before any substantive hearing of a dispute.
>
> 42. The parties were unable to agree on the precise role and attendance of the Umpire. In these circumstances the Tribunal ordered on May 27th 1999 that the arbitration proceed in accordance with sections 21(2),(3) and (4) of the English Arbitration Act.

> 45. On July 18th 2000 Mr Redfern acknowledged the Respondent's confirmation that it wished me to act as Umpire as opposed to Chairman, Mr Redfern observed that the wording of the Respondent's fax intimated that it understood the procedure to be that, if there was a disagreement between the arbitrators, that issue alone was to be referred to me for sole determination, but the arbitrators were to continue to determine other issues arising in the dispute. Mr Redfern observed that this was not how he understood the wording of section 21 of the English Arbitration Act. He had understood it to mean that if the arbitrators failed to agree on an issue their role as arbitrators would cease and the Umpire would continue in effect as the sole arbitrator. Mr Redfern invited submissions from the parties on this point.

It further appears from paragraph 64 of the award dated 12.11.2002 that compound interest under Section 49 the English Act has been claimed and awarded by the arbitrator. We are thus of the view that the arbitration has been conducted and the two awards have been made under the law of England and under Section 48(1)(e), it is a competent authority of England which can set aside or suspend the two awards dated 10.11.2002 and 12.11.2002 and Section 34 of the Indian Act which empowers a Court in India to set aside an award made by an arbitrator each to that extent is excluded.

19. We are unable to accept the submission of Mr. Mukherjee that since article 22 of the agreement provides that the agreement will be governed by the prevailing law of India and it is the law of India under which the award has been made and the competent Court in India can set aside the two awards under Section 48(1)(e) of the Indian Act. Section 48(1)(a) of the Indian Act provides that enforcement of foreign award may be refused, at the request of the party against whom it is invoked if that party furnishes to the Court proof the agreement between the parties is not valid "under the law to which the parties have subjected it". But the language used in Section 48(1)(e) is different and it says that the enforcement of the foreign award may be refused at the request of the party against whom it is invoked only if that party furnishes to the Court proof that the award has been set aside or suspended by a competent authority of the country under the law of which that award was made. The Legislature by using two

different expressions namely, "law to which the parties have subjected the agreement" and "the law under which the award was made" obviously has intended two different meanings and both the expressions cannot mean one and the same thing. In the present case, Since Article 22 of the agreement provides that the agreement will be governed by the prevailing law in India, it is the law of India to which parties have subjected the agreement within the meaning of the expression used in Section 48(1)(a) of the Indian Act. But since Article 22 also provides that in the case of Arbitration, the English Law will apply, it is the English Law under which the arbitration has been conducted and the award has been made.

20. In **National Thermal Power Corporation Vs. Singer Company and others** (Supra) cited by Mr. Mukherjee, agreements dated 17/08/1982 were entered into at New Delhi between the said Corporation and Singer Company, a foreign company for supply of equipment, erection and commissioning of certain works in India for the Corporation. The general terms and conditions of the contract were expressly incorporated in the said agreements and clause 7.2 thereof provided that the laws applicable to this contract shall the laws in force in India. The courts of Delhi shall have exclusive jurisdiction in all maters arising under this contract. Clause 27.6 of the General Terms provided for arbitration of disputes between the parties and Clause 27.7 of the General Terms and Conditions of the Contract provided that the rules of conciliation and arbitration of the International Chamber of Commerce shall apply to the arbitration and the arbitration shall be conducted as such places as the arbitration may determine. The International Chamber of Commerce chose London to be the place of arbitration under Article 12 of the Rules of Arbitration of the International Chamber of Commerce "Rules". The award was made in London. On these facts, the Supreme Court held that the law expressly chosen by the parties in respect of all matters arising under their contract, which must necessarily include the agreement contained in the arbitration clause and the same being Indian law and the exclusive jurisdiction of the courts in Delhi being expressly recognized by the parties to the contract in all matters arising under it, and the contract being most intimately associated with India, the proper law of arbitration and the competent courts are Indian law and Indian Courts, while matters of procedure connected with the conduct of arbitration are left to be regulated

by the contractually chosen rules of the International Chamber of Commerce to the extent that such rules are not in conflict with the public policy or the mandatory requirements of the proper law and of the law of the place of arbitration. Thus, in the aforesaid case of **National Thermal Power Corporation Vs. Singer Company and others** (supra) there was no provision in the agreement between the parties as in the present case, that in case of arbitration, the English Law shall apply and that the arbitration shall be pursuant to the English Arbitration Law in the absence of such a provision in the agreement providing the law of arbitration to be different from the proper law of contract, the Supreme Court held that the law of contract that will be applicable will also include the law of arbitration that will be applicable because the arbitration agreement is part of the main agreement. Moreover, in the aforesaid case of **National Thermal Power Corporation Vs. Singer Company and others** (supra) the Supreme Court was not called upon to interpret the provisions of section 48 of the Indian Act. As we have seen, Section 48 of the Indian Act used two different expressions, "the law to which the parties have subjected the agreement and the law under which the award was made" and these two expressions used by the legislature have to be interpreted to mean two different things. The law to which the parties have subjected the agreement would mean "the law governing the agreement or the proper law of contract applicable to the agreement as chosen by the parties" and "the law under which the award was made" would mean the law according to which the arbitration was conducted and the award was made.

21. In **Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. and others** (supra) cited by Mr. Mukherjee, Sumitomo Heavy Industries Ltd. and the ONGC Ltd entered into a contract on 07/09/1983 whereunder Sumitomo Heavy Industries Ltd. agreed to commission on turnkey basis an oil platform at Bombay High, about 100 miles north west of Bombay. Clause 17.0 of the said contract provided for Laws/Arbitration and Clause 17.1 of the said contract reads as follows:

> "17.1 Applicable Laws: All question, disputes or differences arising under, out of or in connection with this contract shall be subject to the law of India "

Clause 17.2 of the contract provided for arbitration of any dispute, difference or question that may arise between the parties and inter alia stipulated that the arbitration proceedings shall be held at London, U.K. and shall be held in accordance with the provisions of International Chamber of Commerce and the rules thereunder as amended from time to time. The Supreme Court held that the law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement and having regard to the clear terms of clause 17 of the contract between the parties, the law governing the rights and obligations of the parties arising from their agreement to arbitrate, and, in particular, their obligations to submit disputes to arbitration and to honour the award, the law which would apply is the law of India. In the said case of **Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd.** (supra) there was again no provision in the agreement between the parties as in the present case, that in case of arbitration English law of arbitration would apply and that the arbitration will be in accordance with the English Arbitration Act as amended by subsequent amendments. Rather, clause 17 of the contract provided that the applicable law for arbitration of disputes will be the law of India.

22. In **White Industries Australia Limited Vs. Coal India Limited** (supra) cited by Mr. Mukherjee an agreement dated 28/09/1989 was executed in India between Coal India Limited and While Industries Australia Limited for developing an Open Cast Coal Mine at Piparwar in India. Clauses 3.2 and 4.1 in the said agreement provided as follows:

> "3.2: Should the parties fails to reach an agreement within thirty (30) days after the dispute arises or any such greater period as may be mutually agreed upon, the dispute may be submitted by either party to Arbitration for final settlement under the rules of conciliation and arbitration of the International Chamber of Commerce, Paris, France, by one or more arbitrators appointed in accordance with the Rules."

> "4.1: This Agreement shall be subject to and governed by the laws in force in India except that the Indian Arbitration Act of 1940 shall not apply."

Disputes and differences arose between the parties and the arbitration sittings were held in London and the award was made and published in France at Paris. Coal India Limited filed an application for setting aside the award under Sections 34 and 48 of the Indian Act before Calcutta High Court. A Division Bench of the Calcutta High Court held that the cause of action admittedly arose in July 1999 and by that time the Indian Arbitration Act, 1940 was repealed by Section 85 of the Indian Act which came into force in August 1996 and that the parties to the contract made an express choice in Indian law both as the proper law of contract and the proper law of arbitration and India was also the country with which the contract was most closely associated and the contract was signed in India and was entirely performed in India and was to be governed by Indian laws and hence there was no reason for the Court to hold that the expression "the country under the law of which was made" under Section 48(1)(e) of the Indian Act would mean anything but Indian Law. In the aforesaid case of **White Industries Australia Ltd. Vs. Coal India Ltd.** (supra) the only provision in the agreement was that the agreement will subject to and governed by the laws in force in India and there was no provision, as in the present case, that in case of arbitration the English Law will apply and the arbitration will be conducted in accordance with the said provisions of the English Arbitration Act and the subsequent amendments thereto. In this case also, there was no evidence before the Court of a different arbitration agreement which provided that the laws of India will not apply to arbitration and the Court therefore held that since the agreement was subject to and is to governed by the law of India as per the express choice of the parties, the Indian Law was both the proper law of contract and the proper law of arbitration.

23. In **Nirma Ltd. Vs. Lurgi Energie Und Entsorgung GMBH, Germany** (supra) cited by both Mr. Tankha and Mr. Mukherjee, Nirma entered into an agreement on 01/09/1997 with Lurgi and Articles XV and XVI of the said agreement provided as follows:

> **"Article XV: ARBITRATION**:
>
> 15.1 If, at any time any question/dispute or difference whatsoever shall arise between LENTJES and NIRMA out of or in connection with this Agreement, the same shall be finally settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the

International Chamber of Commerce (ICC). The place of arbitration shall be London and arbitration proceedings shall be London and arbitration proceedings shall be carried out in English."

"**Article XVI: GENERAL CONDITIONS** :

16.2 The Agreement shall be governed according to the laws of India."

After the arbitration was held in London and the first partial award dated 08/04/2002 was made by the International Court of Arbitration of the International Chamber of Commerce, Nirma filed an application under Section 34 of the Indian Act for setting aside the said award. A Division Bench of the Gujrat High Court held that there was no doubt about the fact that the proper law governing the arbitration is the law of India and not only the provisions of the Indian Arbitration Act apply to the arbitration but the Court of competent jurisdiction in India had jurisdiction to entertain applications under Section 34 of the Indian Act. In the aforesaid case of **Nirma Ltd. vs. Lurgi Energie Und Entsorgung GMBH, Germany & Others** (supra) also the only provision in the agreement was that the agreement shall be governed according to the laws of India and there was no separate agreement that in case of arbitration the English Law would apply and that the arbitration will be conducted in accordance with the English Act and the amendments thereto as in the present case.

24. Coming now to the view of Justice Potter in **Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd.** reported in **(1994) Lloyd's Law Reports 45** cited on behalf of the appellants, Justice Potter after referring to the provisions of the agreement between the parties has held:

"In this case, as to (1), the parties have made an express choice of Indian law as the proper law of the contract. As to (2), it seems to me likely (although it is not necessary finally to decide) that the proper law of the arbitration agreement is similarly Indian law, since the arbitration agreement is part of the substance of the underlying contract and the terms of cl. 17.1 are clear in that respect."

It will be clear from the aforesaid reasoning of Mr. Justice Potter that since in the case of **Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd.** (supra) the parties had made an express choice of the proper law of contract as Indian law and since the arbitration agreement was part of the substance of the underlying contract, it was held by Mr. Justice Potter that the proper law of arbitration agreement was also Indian law. But in the present case, we find that though the parties have made an express choice of Indian law as the law governing the agreement they have also made an express choice of English law as the law in accordance with which the arbitration was to be held.

25. On an analysis of the aforesaid decisions, it is clear that where the contract contains a provision that it will be governed by the law of India, then in the absence of any other provision in the contract indicating a different law with regard to the law of arbitration to be applied, the arbitration agreement being part of the underlying contract will also be governed by the Indian Law, but where the parties clearly indicate in the contract that the contract will be governed by the Indian law but the arbitration will be held according to the English law, as in the present case, the arbitration is to be conducted in accordance with the English law. This is because the law of arbitration agreement may be different from the proper law of the main contract and in such cases the conduct of the arbitration and making of the award by the arbitrator would be governed by the law of the arbitration agreement and not by the law of the main contract. For this conclusion we are supported by Russell on Arbitration. Relevant portion of paragraph 2–094 of Russell on Arbitration (21st Edition) is quoted herein below :

> "**2-094** : **Law of arbitration agreement may be different form the proper law.**_ While the law of an arbitration agreement usually follows the proper law of the main contract, an arbitration agreement is separable from the main contract between the parties and an arbitration agreement may have a different law from that of the proper law. The parties may choose different proper laws for the two agreements, and other factors may indicate that different laws should apply. "

Thus, where parties to the agreement have subjected the agreement only to the Indian Law and do not indicate in the agreement that the English Law will apply in case of arbitration, then the expression "the law to which the parties have subjected" the agreement in Section 48 (1) (a) of the Indian Act and the expression "under the law of which the award is made" in Section 48 (1)(e) of the Indian Act would be the Indian Law because the arbitration agreement would follow the proper law of the main contract. But where parties to the agreement have subjected the agreement to the Indian Law and have also indicated in the agreement that in case of arbitration, the English Law will apply, as in the present case, then the said two expressions in the said Section 48 (1)(a) and Section 48(1)(e) will mean two different things and "the law to which parties have subjected" the agreement would be the Indian Law and the country "under the law of which the award is made" will be England. We have, therefore, no doubt in our mind that the applications of the appellant under Section 34 of the Indian Act before the learned District Judge, Bilaspur for setting aside the two awards dated 10.11.2002 and 12.11.2003 which were made under the English Act were not maintainable and the two appeals filed by the appellant are liable to be dismissed.

26. For the aforesaid reasons, we hold that the applications filed by the appellant under Section 34 of the Indian Act are not maintainable against the two foreign awards dated 10.11.2002 and 12.11.2002 and accordingly dismiss Misc. Appeal No. 889 of 2004 and Misc. Appeal No. 890 of 2004, but order that the parties shall bear their own costs.

Sd/-
Chief Justice

Sd//-
V.K.Shrivastava
Judge

Brajesh*